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No. 95-1600

Supreme Court, U.S.

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In The  
**Supreme Court of the United States**  
October Term, 1995

LOU MCKENNA, Director, Ramsey County  
Department of Property Records and Revenue; and  
Joan Anderson Groves, Secretary of the  
State of Minnesota,

*Petitioners,*

vs.

TWIN CITIES AREA NEW PARTY,

*Respondent.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eighth Circuit

**BRIEF FOR THE RESPONDENT**

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**QUESTION PRESENTED**

May a state bar a minor political party from nominating its chosen candidate merely because the candidate is also another party's nominee — even when the candidate consents to the minor party's nomination, and the other party does not object?

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## STATEMENT OF THE CASE

### 1. Introduction

This case concerns the right of a minor party to engage in ballot "fusion" — to nominate, in a manner noted on the election ballot, a consenting candidate also nominated by another non-objecting party. This practice, once widespread in the United States and plainly essential to the development of minor parties within our "winner take all" election system, is absolutely banned by the State of Minnesota. The Minnesota fusion ban, the statute challenged here, violates the First and Fourteenth Amendments. It clearly and severely abridges core rights of minor parties and their members — most basically, the right of parties to choose their standard bearers, and the right of minor parties to operate free of electoral restrictions falling disproportionately on them. These rights have long been recognized as fundamental by this Court. *Norman v. Reed*, 502 U.S. 279 (1992); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The interests the State offers in defense of abridging these rights are either not legitimate, or not sufficiently weighty or narrowly advanced by the ban, to justify that infringement.

### 2. Facts of This Case

Respondent Twin Cities Area New Party ("the New Party") was chartered as a chapter of the national New Party in the spring of 1993. J.A. 2.<sup>1</sup> The New Party's broad aims are identical to those of more established parties: to promote

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<sup>1</sup> The Joint Appendix is cited as "J.A."; the Appendix to the Petition for a Writ of Certiorari as "Pet. App."; the Brief for Petitioners as "State Br."; and the Appendix to that brief as "State Br. App."

candidates its members judge best represent their views, to use the electoral process to advance its program, and to widen its base of support in the general electorate. J.A. 6. To advance these aims, the New Party resolved on a mixed electoral strategy combining the nomination of candidates running exclusively as New Party candidates and, where appropriate, nomination of willing candidates of other non-objecting parties. J.A. 5.

In April 1994, New Party members voted to nominate Andy Dawkins, the then incumbent Democratic Farm-Labor ("DFL") state representative from Minnesota House District 65A who was seeking DFL's nomination for reelection, as a fusion candidate. J.A. 3. Although the Party met all substantive ballot access requirements (J.A. 5-6), although Dawkins consented to New Party's nomination (J.A. 5, 10), and although the DFL voiced no objection,<sup>2</sup> the State refused to list Dawkins on the ballot as a New Party candidate on the ground that Dawkins was also a candidate for nomination by the DFL.<sup>3</sup> J.A. 4-5. The New Party sued.

### 3. Decision Of The Court Below

The district court dismissed the New Party's claim, but

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<sup>2</sup> The DFL neither objected to the nomination before the lawsuit, nor asserted any objection to it in the lawsuit. Pet. App. 2, 5.

<sup>3</sup> Minnesota bars fusion both by "'major' parties" — defined in Minnesota as parties that have won 5 percent of a statewide vote and therefore participate in the state primaries (Minn. Stat. § 200.02 subd. 7) — and "minor" parties like the New Party, which have not yet qualified as "major." But it does so through different election code provisions. The major party fusion ban appears in Minn. Stat. § 204B.04 subd. 1, and was not at issue in this challenge. Pet. App. 10. The ban on fusion by "non-major" parties like the New Party is effected by Minn. Stat. §§ 204B.06 subd. 1(b) & 204B.04 subd. 2. These are the statutes that were challenged in this case, and held unconstitutional by the court below. Pet. App. 10.

the court of appeals reversed. Finding that fusion was banned in Minnesota and other states at the turn of the century to "squench the threat by the opposition's combined voting force" (Pet. App. 4), the court concluded that the ban imposed a severe burden on the New Party's associational rights by forbidding the Party to nominate its chosen candidate, despite having the candidate's and the other party's "blessing." *Id.* at 5. The court rejected the claim that the burden was insignificant because the New Party could just "pick someone else" as its nominee (*id.* at 6), and noted that the ban prevented the New Party "from developing [the] consensual political alliances" upon which it depended, as a minor party, in order to "broaden the base of public participation in and support for its activities." *Id.*

By foreclosing a consensual multiple party nomination, Minnesota's statutes force the New Party to make a no-win choice. New Party members must either cast their votes for candidates with no realistic chance of winning, defect from their party and vote for a major party candidate who does, or decline to vote at all.

*Id.*

The court of appeals concluded, moreover, that the fusion ban was broader than necessary to serve the State's asserted interests. *Id.* The State's concerns about splintering, for example, could be served by laws requiring the consent of the candidate and the candidate's party.<sup>4</sup> Where consent is present, the court below explained, the State "has no authority to protect a major party from internal discord and splintering resulting from its own decision to allow a minor party to nominate the major party's candidate" (Pet. App. 7), and it

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<sup>4</sup> The court held that consent was present in the DFL's failure to raise any objection. *Id.* at 2. Where a major party has an opportunity to object, concerns over involuntary fusion are avoided.

may not "constitutionally substitute its own judgment for that of the [major] [p]arty." *Id.* Even if states had such extraordinary power, however, the court found that the State's concern was not a real one, in that — by fostering more competition, participation, and representation — consensual fusion would likely *invigorate* the electoral system rather than threaten its integrity. *Id.*

Similarly, the court concluded that the State's concerns about voter confusion could be dealt with in less restrictive ways — by simple explanations on the ballot — and that, in any event, the concerns themselves were unfounded. As the court observed, consensual fusion "informs voters rather than misleads them" and, by bringing the two parties' political alliance into the open, "helps the voters understand what the candidate stands for." Pet. App. 8. Taking note of this Court's teaching "that courts must skeptically view a state's claim that it is enhancing voters' ability to make wise decisions by restricting the flow of information to them," *Tashjian*, 479 U.S. at 221, the court of appeals observed that "neither the record nor history reveal any evidence that [fusion] nominations have ever caused any type of confusion among voters, in Minnesota or anywhere else." Pet. App. 9.

The court of appeals concluded that the State's remaining concerns were clearly unjustified, either because they were easily avoided by other means or because they were not furthered by the ban. It also noted that the court in *Swamp v. Kennedy*, 950 F.2d 383, *reh'g denied*, 950 F.2d 388 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992), in upholding Wisconsin's fusion ban, had failed to consider whether that ban could have been more narrowly tailored. For all these reasons, the court concluded that Minnesota's fusion ban was unconstitutional. Pet. App. 10.

#### 4. Historical Facts About Fusion

While the nomination of the same candidate by two parties may appear novel today, it was familiar to our forebears. Until the end of the 19th century, fusion was legal throughout the United States. Summarizing the 19th century experience, America's leading electoral historian, Peter Argersinger, notes that fusion was utilized particularly heavily by minor parties in the Midwest and West in the latter 19th century, figuring in virtually every significant election in that period, Argersinger, "A Place on the Ballot: Fusion Politics and Antifusion Laws," 85 *American Historical Review* 287, 288 (1980), and that:

[Fusion] helped maintain a significant third party tradition by guaranteeing that dissenters' votes could be more than symbolic protest, that their leaders could gain office, and that their demands might be heard. Most of the election victories normally attributed to the Grangers, Independents, or Greenbackers in the 1870s and 1880s were a result of fusion between those third party groups and Democrats.

*Id.* at 288-89.

Banned in Minnesota since 1901, and widely banned in other states around the same time, fusion is today permitted only in New York, Connecticut, and a few other states, and widely practiced only in New York. There, however, contemporary observers underscore its importance to supporting a lively minor party tradition since its relegalization in the 1930s. J.A. 15.<sup>5</sup> As in the 19th century, fusion has

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<sup>5</sup> D. Mazmanian, *THIRD PARTIES IN PRESIDENTIAL ELECTIONS* (1974), notes at 134-35:

The essential attribute of New York's modified two-party (fusion)

helped minor parties by permitting them to show their real strength at the polls. And they have often done so dramatically, by providing the margin of victory for prominent candidates. The New York Presidential victories of Franklin Roosevelt in 1940 and 1944, John Kennedy in 1960, and Ronald Reagan in 1980, for example, all required combining major and minor party votes; none of these candidates secured enough votes for victory on the line of his "major" party alone. (J.A. 15-16) Similarly today, Alfonse D'Amato would not be a U.S. Senator from New York, George Pataki would not be Governor of New York, and Rudolph Giuliani would not be Mayor of New York City, but for their fusion support from parties other than the Republican Party. *Id.*; NEW YORK RED BOOK 1995-1996 868 (G.A. Mitchell ed. 1996); THE GREEN BOOK 1994-1995, OFFICIAL DIRECTORY OF THE CITY OF NEW YORK 4 (1995). Even the State does not dispute that "the practice 'has permitted electoral competition from both the left and the right of the mainstream parties, and greater representation of such minority views in the selection of mainstream candidates.'" State Br. 5, quoting Burnham Decl., J.A. 15.

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system is the options it provides to both individual voters and political parties. For the same issue-oriented voters the presence of fairly durable third parties affords a greater variety of choices among party platforms and candidates than does a two-party contest. Alternative arenas are available for potential activists who find the major-party organization either preoccupied with winning office or dominated by an older generation of politicians. Furthermore, the system does not force voters to choose between "throwing away their vote" or voting for one of the two major parties. The modified system allows third parties to retain their specialized constituencies while contributing to election outcomes through coalitions with the major parties. Finally, the ability of third parties to survive over time makes them vehicles for new issues and new programs that otherwise would have to await acceptance by a much broader audience before the major parties would address them.

Correlatively, all historical and political science scholarship on the subject confirms that *removing* the right to fusion disproportionately *burdens* minor parties.<sup>6</sup> And all historical evidence suggests that doing just that was the unmistakable aim of the major party legislators sponsoring such efforts at the turn of the century.<sup>7</sup> Characteristic is the declaration of a Republican state legislator from Michigan, offered at the time of his party's sponsorship of that State's anti-fusion ban:

We don't propose to allow the Democrats to make allies of the Populists, Prohibitionists, or any other party, and get up combination tickets against us. We can whip them single-handed, but don't intend to fight all creation.

Argersinger, *supra*, at 296. And in Minnesota, despite the absence of *direct* evidence of the legislative intent behind its 1901 ban, the circumstantial evidence could hardly be stronger that the ban was prompted by and directed against third party successes of the period<sup>8</sup> — a point the State also does not

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<sup>6</sup> For historical studies of the effects of fusion bans, see Burnham Decl., J.A. 11-18; Argersinger, *supra*; G.O. Clanton, KANSAS POPULISM: IDEAS AND MEN 220-30 (1969); S. Rosenstone, R.L. Behr, and E.H. Lazarus, THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE (1984); and Brief Amici Curiae Of Twelve University Professors And Center For A New Democracy In Support Of Respondent Twin Cities Area New Party ("Amicus Brief of Twelve Professors").

<sup>7</sup> See generally, Burnham Decl., J.A. 13-15; Argersinger, at 295-98; Clanton, *supra*.

<sup>8</sup> During the years before enactment of the ban, fusion was deployed heavily in Minnesota politics by Democrats and Populists, and with considerable effect. As a Democrat/People's Party fusion candidate, John Lind gained 48 percent of the gubernatorial vote in 1896 and then won the governorship with 52 percent of the vote as a fusion candidate in

dispute. State Br. 5.

This aim of suppressing threats from minor parties was substantially accomplished with the proliferation of state bans on the practice. Operating in an environment generally devoid of the fusion option, 20th century minor parties became much more candidate-centered, less frequent, and less enduring than their 19th century counterparts.<sup>9</sup>

Nor is there controversy about just *why* fusion is so important to minor parties. American elections are generally run on "first past the post, winner takes all" rules. Burnham Decl., J.A. 12-13. In such a system, political influence depends on the ability to win a majority or plurality of votes. Being *minor*, minor parties operating in this system typically lack the capacity to command the majority or plurality of votes needed to win electoral office on their own. In the absence of a fusion

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1898, becoming the first non-Republican Minnesota governor in 30 years. He ran again as a fusion candidate in 1900, and lost only narrowly, winning 48 percent of the vote to Van Sant's 49 percent. MINNESOTA LEGISLATIVE MANUAL 165-66 (1993-94). The ban was enacted the following year by a Republican-dominated legislature, and Republican dominance was reestablished immediately, with Republicans easily winning each of the next 15 gubernatorial elections. *Id.* at 166.

Fusion also was a significant factor at the Presidential level during the years immediately preceding enactment of the 1901 ban. In 1892, James B. Weaver ran on both the "Fusion Electors" and Peoples Party tickets, and won a (36 percent) plurality of the votes cast. In 1896 and 1900, William Jennings Bryan ran on the Democratic and Peoples Party tickets, and won 39 and then 36 percent of the vote. In the five previous three-way races from 1860 to 1888 in which the third party candidates did not fuse, no third party candidate received even 5 percent of the vote. *Id.* at 318-319.

<sup>9</sup> See Penniman, "Presidential Third Parties and the Modern American Two-Party System," in W. Crotty (ed.), *THE PARTY SYMBOL* 101-117 (1980); S. Rosenstone, *THIRD PARTIES IN AMERICAN HISTORY*; Mazmanian, *THIRD PARTIES IN PRESIDENTIAL ELECTIONS* (1974).

option, they suffer in consequence from a "wasted vote syndrome." Reluctant to "waste" votes on candidates they perceive as having no serious chance of winning, even voters who support the party's ideology and program will often decline to show that support at the polls. *Id.*, J.A. 13.<sup>10</sup> This syndrome, in turn, reconfirms the diminutive stature of minor parties by putting them in a growth trap. Not yet strong enough to win on their own, they have trouble mobilizing the support needed to build their strength.

When available, historically and today, fusion is used by minor parties to escape this trap. Fusion allows minor parties to enter into alliances with major parties around selected candidates, and to participate in potentially winning electoral coalitions. This enables them to escape the wasted vote syndrome. By following their party's label into that coalition, minor party *supporters* are able to express their support for their party, but not at the expense of wasting their votes on non-viable candidates. They can vote their principles without sacrificing their prudence, and in the process "send a message" to the fusion candidate and others about the party basis of their support. By increasing overall support for the candidate, moreover, the minor party *itself* is able to show the candidate and its major party coalition partner the worth of its support<sup>11</sup> — and thus to gain influence and power.<sup>12</sup>

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<sup>10</sup> Such considerations are paramount to the New Party in this case. See *Maynes Aff.*, J.A. 6-7.

<sup>11</sup> This demonstration is most evident when fusion votes are cast on a "disaggregated" ballot — with separate lines for the different parties nominating the fusion candidate — especially when that candidate's overall margin of victory is less than the votes received on the minor party's line. Even where the margin is greater, however, or where separate ballot lines are not provided, fusion has a similar effect. It permits the minor party to make a contribution, and to be seen as making that contribution; and it permits party supporters to express that support without cost to the efficacy of their vote. See *Swamp*, 950 F.2d at 388-89 (Ripple, J., joined by Posner

Because the "wasted vote syndrome" drives an artificial wedge between latent and expressed support for minor parties, fusion — by removing that wedge — permits a minor party's real level of support in the electorate to be expressed.

In sum, fusion is not an obscure bit of electoral exotica, but a central balancing mechanism of our winner-takes-all electoral system. Historically and today, it has been perhaps *the* central and distinctively American answer to the question of how, within such a system, to assure electoral minorities a fair "availability of political opportunity." *Lubin v. Panish*, 415 U.S. 709, 716 (1974); *Burnham Decl.*, J.A. 17; *Argersinger, supra*, at 288-89. And as 20th century experience shows, widespread denial of this right has had the effect, *intended* by those who enacted the bans (*see pp. 7-8, nn. 7&8, supra*), of denying such minorities effective political expression. For such minorities, the denial imposes a Hobson's choice between political efficacy and conviction — prudence and principle — and in all but the most extraordinary times condemns them to political marginality.<sup>12</sup>

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and Easterbrook, JJ., dissenting from denial of rehearing *en banc*).

<sup>12</sup> See L. Sandy Maisel and C. Bassett (eds.) "Cross-Endorsement Rule," 1 POLITICAL PARTIES AND ELECTIONS IN THE UNITED STATES: AN ENCYCLOPEDIA 218 (1991):

[Fusion] allows state minor parties to sustain themselves without actually winning elections on their own, as voters can demonstrate support for minor parties and not "waste" their votes on minor party candidates....[Fusion] gives minor parties some bargaining ability, as they can exchange their endorsement for ideological or material concessions.

<sup>13</sup> Such "extraordinary times" prominently include world war and massive depression, as Minnesota's own experience with the Farmer-Labor Party ("FLP") makes clear. Out of a loose independent political federation formed during the domestic turmoil associated with World War I, the FLP was consolidated in 1923-24 in expectation of state gubernatorial success

## SUMMARY OF ARGUMENT

While political parties are not mentioned in the Constitution, they have always been understood to perform key functions in the working of representative democracy and to be essential vehicles of constitutionally protected speech and association. In the operation of our republican form of government, parties are fundamental. They are *the* principal means by which individuals associate in the advancement of common political aims, and by which political competition and governance itself are *organized* — from the articulation of programs of public action, to the identification of candidates to carry those programs into effect, to the contest among those candidates in regular elections, to the coordination and discipline of elected officeholders. And as organizations indispensable to the effective exercise of political liberty, parties inherit the protections of that liberty found in the Constitution.

At least in recent decades, this Court has found that inheritance to include the right of parties themselves, as collective associations of members and supporters, to direct protection under the First and Fourteenth Amendments. And in our "scheme of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), the Court has explicitly recognized the need to protect new and minor parties from regulation, *de facto* authored by their major party competitors, imposing distinctive burdens on their ability to survive and grow. More particularly,

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for itself and presidential success for Robert M. LaFollette in the elections of 1924. Disappointment in both expectations quickly led to disarray. The Great Depression intervened to revive the party's fortunes, and it enjoyed a string of successes over the short period of 1930-36. But by 1938 it had effectively collapsed. See M. Gleske, MINNESOTA FARMER-LABORISM: THE THIRD PARTY ALTERNATIVE (1979); R. Valelly, RADICALISM IN THE STATES: THE MINNESOTA FARMER-LABOR PARTY AND THE AMERICAN POLITICAL ECONOMY (1989). See also Amicus Brief of Twelve Professors.

this Court, while respectful of the needs of states to regulate the election process, has declared the substantial *autonomy* of parties and their members to govern their own affairs and choose their electoral strategies, and the right of minor parties to regulatory *neutrality* — understood as freedom from overt discrimination and from regulatory burdens falling disproportionately on them — as bedrock constitutional rights under the First and Fourteenth Amendments.

Constitutive of these rights are the more specific rights of minor parties and their members (1) to choose their nominees, (2) to communicate that choice to supporters on terms equal to those offered other parties, and (3) to do so on their own ballot line. A finding of the first two rights is necessary and sufficient to uphold the decision of the court below; a finding of the third would be sufficient, but is not necessary.

The first two rights are severely infringed by Minnesota's absolute ban on fusion, which may be thought either to extinguish them directly or unconstitutionally to condition the exercise of one on the surrender of the other. Where the minor party chooses as its standard bearer the nominee of another party, the ban prohibits that choice from being communicated by the party on terms equal to those offered other parties — with a "label" on the ballot indicating that the minor party has in fact nominated that candidate. Or the minor party is "permitted" a label, but only for a nominee that is not in fact its first choice. It would be difficult to imagine a more oppressive intrusion on party functioning, or a more invidious discrimination against an electoral tactic of uncontested importance to minor parties. Nothing is more fundamental to a party than the choice of candidates to represent it in electoral competition. Nothing is more important to a party's ability to mobilize its supporters around candidates than its ability to identify those candidates, on the ballot, as its own. Nothing is more important to voters wishing to support

the party than the ability to receive that information.

In denying the minor party a right to communicate its choice of candidate, Minnesota's fusion ban *a fortiori* suppresses the party's right to do so on its own ballot line. But the distinctness of that line, and the consequent ability to show the real dimensions of its support among voters, is literally constitutive of the strength of the party and its supporters in the electoral marketplace. Nothing more successfully defeats the workings of a partisan election system than a ban on recording and distinguishing the strength of partisans. Nothing could be more deeply violative of the fundamental rights of parties and their supporters freely to associate for the advancement of their common political aims and to petition for that purpose.

In any challenge to a state election law, a court must weigh the burden on the constitutional rights imposed by the challenged law against the state interests the law purportedly serves. As announced in *Anderson*, and subsequently reaffirmed in *Burdick v. Takushi*, 504 U.S. 428 (1992), the reviewing court must first identify "the character and magnitude of the asserted injury" to the challenger's protected rights; then identify the "precise interests put forward by the state as justifications" for that injury, in every case taking into account "the extent to which those interests make it necessary to burden the plaintiff's rights" — an inquiry that demands at least a close "fit" between the challenged law and the State's interests. *Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434. Indeed, in cases such as this, where the abridgement is direct and severe, there must be proof that the State has "chosen the most narrowly tailored means," *Norman*, 502 U.S. at 294, "to advance a state interest of compelling importance." *Id.* at 289.

In this case, either standard leads ineluctably to invalidation of Minnesota's absolute ban on fusion.

Given the heavy burdens Minnesota's fusion ban imposes on core first amendment freedoms, it is incumbent on the State to show equally fundamental state interests to be narrowly advanced by the ban. But the State does not come even close to making this showing, for the basic reason that the interests it asserts in defense of the ban — interests in avoiding voter confusion, protecting political diversity, avoiding electoral "distortions," and avoiding faction — are not even *rationaly related* to it and, in some instances, are flatly inconsistent with the First Amendment itself.

The ban does not reduce voter confusion; it promotes it — by misleading voters about the real sources of candidate support and the real distribution of partisan support in the electorate. The ban does not protect political diversity; it suppresses it — by making it far more difficult for minor parties to survive and grow. And the ban does not diminish the only even arguable "distortion" identified by the State — the "raiding" of one major party's primary by supporters of another — for the simple reason that it is challenged only in its application to *minor* parties, who hold no primary elections in Minnesota. Finally, and on its face, the ban does not prevent faction — but alliance.

Worse still, the State's defense of its fusion ban rests impermissibly on the supposed virtues of withholding indisputably truthful information from voters and wrongly confuses the entirely correct proposition that the First Amendment advances the *ends* of ideological and political diversity with the quite different, and constitutionally false, proposition that the First Amendment permits the State to employ, as a *means* to that end, the power simply to mandate its vision of diversity by editing or manipulating the political choices made by the people themselves through the parties with which they choose to associate.

With the burden on the constitutional rights of the New Party and its supporters this heavy, and not even the beginnings of justification offered by the State, the judgment of the court below should be affirmed.

## ARGUMENT

### I. POLITICAL PARTIES HAVE RIGHTS TO AUTONOMY AND NEUTRAL TREATMENT.

Political parties have rights of association protected by the First and Fourteenth Amendments:

[I]t is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments.

*Eu*, 489 U.S. at 224, quoting *Tashjian*, 479 U.S. at 214.

This Court's decisions declare two broad areas of judicial solicitude for party rights: where regulations burden party *autonomy* in the performance of key organizational functions (e.g., internal governance, candidate selection, general electoral strategy); and where regulations violate basic notions of *neutrality* by disproportionately burdening minor parties. These rights are enjoyed by parties directly, as organizations of like-minded individuals who have chosen to associate in the advancement of political aims, and they limit the intrusion of state power into party operations. In *Cousins v. Wigoda*, 419 U.S. 477 (1975), and *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), the Court held that state law could not override rules of the national Democratic Party for selecting that party's delegates to a Presidential convention. In *Tashjian*, it held that a state Republican Party had a first amendment right to invite non-members to vote in its primary and struck down a closed primary law interfering with that right. In *Anderson*, it struck

down early filing requirements as disproportionately burdensome to independent candidates and minor parties. In *Eu*, it invalidated a state law prohibiting political parties from endorsing candidates before a primary. And in *Norman*, it enjoined Illinois from enforcing a law that prohibited a minor party from using the name of another, consenting party.

With respect to *autonomy*, the cases have repeatedly underscored the importance of respecting a party's own choices about organizational governance and strategy, including electoral strategy. As the Court observed of the Republican Party's unusual strategic choice in *Tashjian* — to open its primary to non-Republican voters — "[t]he Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association." 479 U.S. at 214. Such choices are for the party and its supporters, not states, to make.

With respect to *neutrality*, the cases make clear that the First Amendment protects the right of minor parties to operate in an electoral system not structured so as to be disproportionately burdensome to them. This Court has been properly suspicious of the potential abuse, by major parties, of their *de facto* monopoly on state legislative power to erect artificial barriers to competition from minor parties.

The right to neutrality certainly includes protection from open and obvious discrimination against minor parties. Thus in *Williams v. Rhodes*, 393 U.S. 23 (1968), the Court struck down an Ohio ballot access law that discriminated against minor parties on its face. Ohio defended its law as promoting the two-party system "in order to encourage compromise and stability." This Court found this unacceptable, responding that "[t]he Ohio system does not merely favor a 'two-party system'; it favors Republicans and Democrats — and in effect tends to give them a complete monopoly." *Id.* at 31-32. On its face, the Ohio statute violated the essential

neutrality required of state action with regard to the participants in electoral competition.

But more than a formal appearance of neutrality is required. The first amendment right of minor parties to political liberty and equal opportunity includes the right to be free from facially neutral regulation that, given the place of minor parties in our electoral system, predictably and inherently saddles them with a disproportionate burden. Thus in *Anderson*, this Court struck down a filing deadline affecting both partisan and independent candidates. It did so after considering the special impact of such a deadline on independent candidates (who typically do not decide to make an independent bid for office until much closer to the election), and after concluding that the deadline was predictably disproportionate in its burden on such candidates and on minor parties. 460 U.S. at 790-93. The Court held that a "burden that falls unequally on new or small political parties or on independent candidates impinges, *by its very nature*, on associational choices protected by the First Amendment." *Id.* at 793-94 (emphasis added). Similarly, in *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), and *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 91-98 (1982), the Court mandated the exemption of minor parties from disclosure requirements on campaign finance that it had upheld as applied to major parties — on the ground that such disclosure as applied to parties outside the mainstream was unduly burdensome, unnecessary given their well-publicized viewpoints, and potentially threatening to their members.

These decisions do not mandate "affirmative action" for minor parties — in the sense of preferential treatment directed to improving their resources or standing.<sup>14</sup> Nor do they raise

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<sup>14</sup> Nor does the New Party assert any such mandate here, despite the State's fanciful assertions that the Party seeks affirmative state action

any fundamental challenge to the defining political rules by which electoral outcomes are generally decided — as "winner take all" contests within single-member districts. But where a regulation is dispensable in the maintenance of such rules, where it serves no other important state interest, where it inherently has a disproportionately adverse impact on the ability of minor parties to achieve political efficacy, and where it thereby undermines the core value of fair equality of political opportunity, it cannot stand. *See Anderson*, 460 U.S. at 793 n.15.<sup>15</sup>

This case involves burdens on both the autonomy and neutrality rights of political parties and their members. On its *face*, the Minnesota law limits every political party's autonomy in choosing candidates. In its *consequences*, it restricts the availability of political opportunity in ways disproportionately burdensome to minor parties — by denying them the ability to enter those electoral coalitions that they, as minor parties, disproportionately need if they are to be viable in our "winner take all" election system.

Within this broad frame of reference, one can identify three quite specific and concrete first amendment rights of minor parties that the Minnesota ban on fusion essentially obliterates: (1) the right to nominate the candidate of their

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to "maximize the ability of minor parties to develop popular support." State Br. 33.

<sup>15</sup> It is useful to distinguish two ways in which facially neutral election rules might disproportionately burden minor parties: (1) by imposing general requirements (e.g., on signature gathering or other antecedents of ballot access) that are intrinsically more difficult for minor parties to meet because of their lesser capacity; (2) by imposing limits on party activity, compliance with which is essentially costless in itself, which have far more damaging consequences for minor parties than major ones. The Minnesota statute challenged here is of the second kind. *See Anderson*, *id.*

choice; (2) the right to communicate that choice on the ballot on terms equivalent to those offered other parties, and the correlative right of supporters to receive that communication on those terms; and (3) the right to make that communication on a separate ballot line.<sup>16</sup> We first adumbrate these rights, and then address the burden imposed by the challenged law.

## II. THE STATE'S BAN ON FUSION DIRECTLY ABRIDGES AND SEVERELY BURDENS CORE FIRST AMENDMENT RIGHTS.

### A. A Political Party Has A Core First Amendment Right To Nominate The Candidates Of Its Choice.

A party's right to choose its "standard bearers" — to nominate the candidates chosen by its members — has been repeatedly recognized by this Court as *fundamental*, and as enjoying core first and fourteenth amendment protection.

This Court unanimously and emphatically made this point in *Eu v. San Francisco County Democratic Central Committee*:

Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to identify the people who constitute the association, and to select a "standard bearer who best represents the party's ideologies and preferences." . . . Depriving a political party of the power to endorse "suffocates that right . . . at the crucial juncture at

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<sup>16</sup> Although this Court's conclusion about the constitutionality of Minnesota's ban — which bars fusion with or without separate ballot lines — does not depend on the right to a disaggregated ballot, we submit that a separate ballot line or vote count *is* constitutionally mandated. *See II.C., infra.*

which the appeal to common principles may be translated into concerted action, and hence to power in the community."

489 U.S. at 224 (citations omitted). Quoting from the dissent in *Tashjian v. Republican Party of Connecticut*, this Court explained further that:

Freedom of association . . . encompasses a political party's decisions about the identity of, and the process for electing, its leaders . . . . The ability of the members of a [political party] to select their own candidate . . . unquestionably implicates an associational freedom.

489 U.S. at 229-30 (citations and internal quotations omitted). Indeed, this Court had already observed in *Tashjian* that:

Were the state to . . . provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition on potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals . . .

479 U.S. at 215. And Justice Scalia, joined by the Chief Justice and Justice O'Connor, while dissenting from the majority's holding on the particulars in *Tashjian*, acknowledged that a state law restricting "the ability of [party] members to select their own candidate . . . unquestionably implicates an associational freedom," as would a state law "restricting the ability of the Party's members to select *whatever candidate they desire*." *Id.* at 235-36 (Scalia, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting)(emphasis added).

These opinions cannot be reconciled with the State's novel and stingy suggestion that the organizational interests of political parties enjoy no direct protection under the First and Fourteenth Amendments, and that minor parties enjoy protection only insofar as they offer "alternative *candidates*." State Br. 14-15 (emphasis added).

The State's entirely candidate-centered view — for example, that Minnesota's fusion ban imposes no burden on the New Party's rights because its members can simply vote for the candidates the Party is barred from nominating on another party's line, or support its preferred candidate off the ballot (*id.* at 18-19) — mistakes the Party for a mere interest group. A political party exists to compete for government power in electoral arenas. A party cannot create and develop itself if it does not itself appear in those arenas. Saying that the New Party should be content with supporting candidates without being in any way credited with that support on the ballot is like saying a corporation should be content to advertise products for *others* to benefit from their sale. If the State were to suggest that its Democratic and Republican parties show support for candidates merely by taking out advertisements without running them on their ballots, this Court would rightly declare the suggestion preposterous. The suggestion is no less preposterous as applied to a minor party.<sup>17</sup>

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<sup>17</sup> This Court most recently addressed the first amendment rights of political parties in relation to the rights of party members, of voters, and of the candidates parties select and support for election in *Colorado Republican Campaign Committee v. FEC*, 116 S.Ct. 2309 (1996). While the campaign finance context of the case led to divisions among the Justices, there was no division on the basic proposition that a party's expression of its views in pursuit of the "practical democratic task ... of creating a government that voters can instruct and hold responsible," through the party's autonomous choice of which candidates to support, is "'core' First Amendment activity." *Id.* at 2316 (Breyer, J., announcing the Court's judgment in an opinion joined by O'Connor and Souter, JJ.); *id.* at 2322 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring in

And the State's related claim that barring a minor party from nominating "only" the few candidates who have been nominated by major parties imposes a *de minimis* burden (State Br. 19), misses entirely the constitutional force of the party's right to nominate *the* candidate of its choice (not simply *some* candidate), and of the party's right to a meaningful opportunity to participate in a winning electoral coalition — an opportunity essential to developing the party itself. While the number of potential candidates is close to limitless, the range of *viable* candidates typically is not; and choosing and advancing the *one* candidate it judges most viable for its purposes is at the very core of what a party interested in growing its influence is about. Any other view would surely have required the opposite result in *Norman*, where — in a decision subjecting the challenged regulation to strict scrutiny and striking it down — a unanimous Court rejected out of hand the State's defense that barring a new party from using the name of an existing party was *de minimis* since the new party remained free to choose any of an infinite number of other names.

**B. The First Amendment Protects The Right Of A Party To Communicate Its Choice Of Nominees On The Ballot On Terms Equal To Those Offered Other Parties, And The Right Of The Party's Supporters And Other Voters To Receive That Information.**

In partisan elections, a party's choice of nominees is typically communicated on the ballot itself. This communication helps the nominating party mobilize supporters to vote for its candidates by identifying them as its candidates.

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judgment and dissenting in part); *id.* at 2331 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in judgment and dissenting in part); *id.* at 2332 (Stevens, J., joined by Ginsburg, J., dissenting). As Justice Thomas, joined by the Chief Justice and Justice Scalia, put it, "the danger to the Republic lies in Government suppression of such activity." *Id.*

It is a critical source of information for the great majority of voters, who typically know more about the ideals and values of the parties than of particular candidates, and who accordingly rely upon party "labels" as a voting guide.<sup>18</sup>

This case does not present the question whether, in general, states have a constitutional obligation to identify candidates for office by such party labels. Once a state chooses to provide such labels for one or more qualified nominating parties, however, it is obligated under the First and Fourteenth Amendments to provide them on equal terms for all. To provide this communicative opportunity to some political parties but not others is a constitutionally unacceptable departure from state neutrality in electoral competition — here, a departure all the more constitutionally offensive because it turns on the political association and identity of the party's chosen nominee. *Rosen*, 970 F.2d at 175; *Murphy v. Curry*, 70 P. 461 (Cal. 1902).<sup>19</sup> *Cf. Meyer v. Grant*, 486 U.S. 414, 424

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<sup>18</sup> The importance of such labels was recognized by this Court in *Tashjian*, 479 U.S. at 220 (party labels provide a shorthand designation of the views of party candidates on matters of public concern, and thus play a role in the process by which voters inform themselves for the exercise of the franchise). It was also observed by both experts and the court of appeals in *Rosen v. Brown*, 970 F.2d 169, 173 (6th Cir. 1992) ("[the] use of a name and a label allow[s] people to make a connection between the candidate and his platform and to create an identification in the voter's mind ... at the crucial moment of choice in the election campaign.") *Cf. Riddell v. National Democratic Party*, 508 F.2d 770, 775 (5th Cir. 1975) (ability of new faction of the Democratic Party to express its affiliation with that party *on the ballot* had a "substantial political effect" on the new party's organizational efforts and electoral success).

<sup>19</sup> In *Murphy*, the California Supreme Court applied precisely this rationale to strike down a fusion ban under the state constitution. While obviously not binding on this Court, that court's opinion may be of interest here:

It may be that in the ideal democracy, where intelligence is universal and knowledge widespread, the state, if it adopted the

(1988)(once a state has authorized citizen ballot initiatives by statute, the fact that it was not constitutionally required to do so does not authorize it to limit discussion of political issues raised in initiative petitions); *Widmar v. Vincent*, 454 U.S. 263 (1981)(having created a forum generally open for use by student groups, university may not exclude particular political group without satisfying constitutional test).

The State's argument — that the Party's having its name identified with the candidates it nominates is mere "expression" for which, after *Burdick* the ballot is not recognized as a constitutionally mandated vehicle (State Br. 32-33) — is wrong for several reasons.

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secret ballot, would do no more than print the designation of the offices to be filled, leaving blank spaces for the voters within which they could indicate the man or men of their choice. But under our system the state has gone much farther than this. It has recognized the existence of different political parties ... has prescribed rules and regulations touching the form and matter of the official ballot, and upon that official ballot has arranged that political parties and their nominees shall have their appropriate places, and that there shall be conveyed to all the voters the information as to each nominee that he is the chosen candidate of at least one political party. But having gone so far, and having made of itself an information bureau, it becomes the duty of the state to convey information that is exact,—that is fair to all political parties, and fair to the nominees of all political parties, as well as fair to the voters at the polls...

It certainly must be true that a political party ... may nominate whomsoever it pleases for any office, provided that person have the proper legal qualifications. It is a drastic interference with the rights of such political parties to refuse any recognition to any of its nominees because, and only because, some other political party has likewise seen fit to nominate him.

First, it overstates *Burdick* itself, which held only that the claim of an individual voter to use the ballot "to voice. . . generalized dissension from the electoral process" by casting a write-in protest vote, 504 U.S. at 441, was overborne by the State's administrative concerns. *Burdick* does not hold that the ballot serves no expressive function, only that this function is not so general as to sustain solicitude for such petty protest. It is inconceivable that this Court intended its decision in *Burdick* to dismiss the widely recognized function of the ballot as a means of permitting voters — in the aggregate — to use their votes — meaningfully — to "send a message" about policy preferences, and thereby to advance their shared political goals.

Second, the fusion ban interferes with the message sent to voters by the party, in the voting booth, that it has nominated a particular candidate, and it does so despite the fact that the State otherwise uses its ballot system for precisely this purpose. *Burdick* leaves untouched the premise, most clearly articulated in *Rosen, supra*, that the State is required to accord this right to every qualified party if it grants it to any. To provide ballot content for some qualified parties while suppressing it for others (based on the political affiliations of their chosen candidates) is nothing but censorship.

Finally, it is simply not the case that a party's nomination of a candidate on the ballot with its own label serves a merely "expressive" function (State Br. 32-33), or that Minnesota does not use ballot results to measure a party's support. State Br. 26. Tallies on party-identified ballot lines are almost universally used — as they are in Minnesota<sup>20</sup> — to determine the party's continued access to the ballot. For a political party, it is impossible to imagine a more critical and

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<sup>20</sup> Minn. Stat. § 200.02 subd. 7.

substantive function. This is not a use of the ballot for mere "expression," and certainly not for "generalized dissension from the electoral process." The party's very existence as a party with ballot status may be at stake. *See infra* at III. C.

**C. The First Amendment Also Protects The Right To Nominate Candidates On A Party's Own Ballot Line.**

By denying minor parties any right to communicate their choice of candidate on the ballot, Minnesota's fusion ban *a fortiori* denies their right to do so on their own ballot line. But contrary to the State's repeated implication,<sup>21</sup> and as the fallback law enacted in the wake of the decision below suggests,<sup>22</sup> recognition of a right to fusion does not *ipso facto* require separate ballot lines for jointly-nominating parties. While "fusion" ballots have nearly always featured such separate lines, with votes cast for the fusion candidate on each line counted separately and then combined in the candidate's total vote vis-a-vis rivals, an "aggregated" ballot, in which the jointly nominating parties share a common ballot line, is certainly conceivable.

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<sup>21</sup> State Br. 3, 6, 8, 10, 14, 21-22, 25, 38, 42, 45.

<sup>22</sup> Minnesota's 1996 fallback law, in effect since April 2, 1996, but written to expire automatically if the Court of Appeals' decision is reversed, mandates a fusion ballot on which the labels of all the parties nominating a given candidate appear with that candidate's name in one place on the ballot, precluding any separate count of the minor party votes. State Br. App. B. The statute also forbids crediting any votes cast on such a fusion line toward the qualification of minor parties for ballot status — without similarly discrediting their use for that same purpose by major parties! State Br. App. B-3. If there is little dispute about the anti-minor-party animus of Minnesota's legislature in 1901, there can be none about its animus in 1996.

But while a decision invalidating Minnesota's blanket ban, which bars fusion with or without a separate vote count, does not require a finding that such a count — and the separate ballot line that would support it — is constitutionally mandated, there are compelling reasons for the Court to hold that in fact it is.

First, party labels are not only an important source of information for voters to *receive*. The votes cast on the *basis* of those labels are also indispensable information sent *from* the voters, facilitating the effective functioning of our political system. The right of citizens to convey that information is fundamentally protected. For candidates, officeholders, and other policy-makers (and voters), knowing which party programs enjoy support in the electorate, and the level of that support, provides the most basic sort of democratic instruction. It tells them what the people want them to do.<sup>23</sup> But if votes cast on the basis of one partisan affiliation are mixed together with votes cast on the basis of another, that instruction cannot be conveyed clearly. The voice of the people is artificially slurred.

Again, to suggest that the protection of the right of people to be heard and heard clearly does not survive *Burdick* is fundamentally to confuse the holding in that case. It is one

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<sup>23</sup> Reciprocally, a disaggregated ballot permits more precise signalling from voters to elected officials. As Judges Ripple, Posner, and Easterbrook, assuming such a ballot, noted in their dissent in *Swamp*, 950 F.2d at 389:

If a person standing as the candidate of a major party prevails only because of the votes cast for him or her as the candidate of a minor party, an important message has been sent by the voters to both the candidate and the major party.... Such information is of immense value to the electorate, and it would indeed be salutary for the candidate to know which platform the majority of the voters favor.

thing for the Court to find, as there, that a state had no obligation to broadcast a single write-in vote for Donald Duck. It is quite another to deny the supporters of a political party — having already shown sufficient organization and strength to qualify for access to the ballot and to secure the nomination of candidates on that ballot — the ability to demonstrate the dimensions of their strength in the general electorate. Without the opportunity to make such a demonstration, their fair opportunity to advance their aims through their party is fundamentally frustrated, and information on voter preferences and beliefs — just how many voters support which sort of program — is distorted.<sup>24</sup>

With separate ballot lines, these frustrations and distortions are immediately relieved. Voters can show their support clearly; participants in the electoral system — candidates, voters, and the political parties themselves — get the benefit of accurate information on the distribution of popular sentiment. And elected officials and other policymakers receive a precise "democratic instruction," making the achievement of a representative government "of the people, by the people, for the people" — the "republican form of government" guaranteed by Article IV § 4 — that much more likely. Separate ballot lines thus reduce the burden on core rights while rendering the entire electoral system more consistent with our Constitution's basic structure.

A second and independent reason to require separate ballot lines arises from the way that party ballot status is

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<sup>24</sup> Contrary to the State's implication (*see* n.21 *supra*), a separate vote count will not necessarily advantage minor parties in every case. Where the minor party contributes only few votes to the candidate's total, both that candidate and the public learn as much, and the prestige of the party is correspondingly diminished. Just as a party whose vote count is consistently impressive will grow stronger, a party whose vote count is consistently low will likely fail.

determined in Minnesota (and virtually all other states): through party vote totals in selected state elections. Without ballot disaggregation, parties offering fusion candidates in those elections will not be able to show their specific vote totals, and will thus fail to satisfy ballot maintenance requirements.<sup>25</sup> In effect, exercising the right to fusion will be "unconstitutionally condition[ed] on a party's willingness to

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<sup>25</sup> This problem might be addressed through artificial accounting devices — assigning all the votes on the fusion line (1) to the major party, (2) to the minor party, (3) to both, (4) to neither, or (5) upon some basis other than what actually happens inside the ballot box itself — but each of these options is gravely flawed. *See* Note, "Fusion Candidacies, Disaggregation, and Freedom of Association," Note, 109 *Harv. L. Rev.* 1302, 1336 (1996):

The first two options would be difficult to square with a concern for equal application of the law. Each would establish a seemingly arbitrary classification of votes to the detriment of one side of an electoral coalition. Assuming a system of consensual fusion only, the first, second, and fourth options would likely have the practical effect of deterring all fusion candidacies. Attribution of all votes to the *major* party would remove much of the incentive for a minor party to choose fusion. Attribution of all votes to the *minor* party would probably be viewed as undesirable and would likely weaken the major party; this option lowers the latter's incentive to consent. Attribution of the votes to *neither* party would compound these disincentives, and effectively condition fusion on the willingness of each party to forego the opportunity to claim a candidate as its own. At the least, under the fourth option, no party would ever consent to fusion in an election that is used to satisfy statutory ballot status requirements. The second and third options both suffer from the flaw identified by the *Swamp* court that minor parties would be encouraged to "leech onto" support generated by the senior partner in the electoral coalition.

And any version of the fifth option would defeat the basis of vote-dependent ballot laws — which is in fact to tie ballot eligibility to actual electoral performance.

forego sustained ballot access." *See Note*, 109 *Harv. L. Rev.* at 1334-36.

Separate ballot lines avoid this problem simply and effectively. Aggregated for purposes of determining which candidate wins, votes cast on different fusing parties' ballot lines would be credited to those parties, respectively, in determining their satisfaction of ballot maintenance requirements.<sup>26</sup>

#### **D. Each Of These Rights Is Severely Burdened By Minnesota's Fusion Ban.**

Where a minor party seeks as its standard bearer a candidate also nominated by another party, Minnesota's fusion ban forces the party to choose between its right to select its standard bearer and its right to communicate its choice (and for its supporters and other voters to receive that communication), on the ballot, on terms equal to those offered to other parties. The fusion ban effectively declares that a minor party may select as its standard bearer a candidate also nominated by another party — but only if it does not signal that choice on the ballot. Alternatively, a minor party may communicate a choice of candidate on the ballot — but only if it does not select as its nominee the candidate it wants. *Cf. West Virginia Board v. Barnette*, 319 U.S. 624, 634 (1943); *Aboud v. Detroit Board of Education*, 431 U.S. 209, 234 (1977). The Constitution does not permit imposing such a choice between constitutional rights. *Simmons v. United States* 390 U.S. 377, 394 (1968); *cf. New York v. United States*, 505 U.S. 144, 174-76 (1992).

<sup>26</sup> The State's claim that there is something wrong with counting fusion votes toward ballot status is incorrect. *See infra* at III.C.

Either limitation on a political party's freedom is crippling to political efficacy. Parties exist to compete for government power, on political programs for the use of that power, in elections in which they mobilize supporters around candidates they judge best able to advance those programs. For the State to deny a party the ability to choose the candidate it considers best qualified to advance its program unquestionably burdens severely a core right of political expression, association, and petition. It interferes with party autonomy at precisely the point at which the exercise of that autonomy becomes real — through selection of the candidate the party judges best able to advance its aims. It would be hard to imagine a more fundamental interference with the basic goals and functions of a political party.

Equally, for the State to forbid a party to identify, at the ballot box, its chosen standard bearer as its own nominee disrupts the most important communication the party makes to its supporters and potential supporters — the communication of the identity of the candidate for whom the party urges its supporters, *as* supporters, to vote. By detaching voting support of candidates from the partisan affiliation of such candidates, such state action also destroys the most important means by which a party can show its real base of popular support — by showing the number of votes cast on a ballot line identified with it. Nothing could be more threatening to a party's ability to grow or exert influence in policy debate — to further the associational rights and aims of its members and supporters.<sup>27</sup>

That Minnesota burdens these rights "only" in the case of joint nomination does not in the least relieve the severity of

<sup>27</sup> And, as our discussion of the history of fusion legislation demonstrates (*supra* at pp. 5-10), precisely these effects of fusion bans are well documented.

the burden in such cases.<sup>28</sup> And, in any event, whether or not to pursue joint nominations with other parties is a matter for the party itself, not the State, to decide. What else can a right of "political association" mean in this context but a right to decide whether or not to *associate* oneself with another in the choice of a common standard-bearer? If the New Party seeks to advance its influence through fusion, neither more nor less than if the Republican Party of Connecticut seeks to advance its influence by opening its primary, *see Tashjian, supra*, it is not for the State to bar that practice or to condition its exercise on the surrender of other core freedoms.

It is also beyond controversy that fusion is of far greater value to minor than to major parties<sup>29</sup> — and

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<sup>28</sup> See also *Anderson*, 460 U.S. at 791 n.12 (that five candidates representing "ideologically committed minor parties" qualified despite early filing deadline did not diminish the burden imposed by the deadline on *Anderson's* more pragmatic supporters who, unlike the supporters of the "ideological" parties, had a political interest in awaiting the outcome of the major party campaigns); *cf. Meyer v. Grant*, 486 U.S. at 418 n.3 (that Colorado ranked fourth in the nation in number of initiatives placed on the ballot did not negate the fact that the challenged prohibition against the use of paid circulators inhibited the plaintiffs' ability in that case to place *their* initiative on the ballot); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion by Justices O'Connor, Souter, and Kennedy, JJ.) (severity of a law's burden must be measured with reference to the subset of persons whose rights the law in fact burdens, not the set of all whom the law potentially governs).

<sup>29</sup> At various points in its brief, the State questions the relative importance of fusion to minor parties. It notes that factors other than fusion bans also contributed to the decline of minor parties in the 20th century, that the existence of a fusion option does not guarantee significant minor party activity, and that, in a few instances, significant minor party activity has at least briefly flared in a non-fusion setting. State Br. 26-28. The State's claims are overstated — and irrelevant. First, the State cites a total of two successful minor-party state candidacies in two states where fusion is assertedly banned, purporting to show that minor parties do not need fusion. *Id.* at 27. In fact, the candidate in one of the two states (Don

reciprocally, that a general ban on fusion hurts minor parties much more than it hurts others.<sup>30</sup> It strengthens the grip of two-party dominance — and does so not just for *any* two

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Gorman of New Hampshire), along with a second minor party candidate (Jim McClarin), were elected in 1994 to the New Hampshire State Legislature as the result of write-in fusion (STATE OF NEW HAMPSHIRE MANUAL FOR THE GENERAL COURT, NO. 54 (1995) at 201, 209, 302-03, 299), which *is* permitted in that State. S. Cobble & S. Siskind, FUSION: MULTIPLE PARTY NOMINATION IN THE UNITED STATES, 29-30 (1993). In addition, the State missed the Vermont example of Thomas Salmon, who ran for governor and won in 1972 and 1974 as both a Democrat and an Independent Vermonter, CONGRESSIONAL QUARTERLY GUIDE TO ELECTIONS, 2d Ed., at 532 (1985); as well as that of Vermont's Secretary of State James H. Douglas, who ran as a fusion candidate in three out of six elections. Cobble & Siskind, at 44.

In any event, the State nowhere directly contests any of the New Party's amply documented historical and analytic claims: that fusion is more important to minor than major parties, and that its ban burdens minor parties disproportionately; that fusion was essential to the practice of 19th century minor parties, themselves far more organizationally mature and successful than most minor parties today; that fusion bans were a major cause of minor party decline in the 20th century; that the bans were enacted with the specific goal of suppressing minor parties; that no minor party traditions have survived at the state level in the 20th century except in states permitting fusion. *See pp. 5-10, infra*; and Amicus Brief of Twelve Professors.

<sup>30</sup> This is not to say that major parties are not *also* deprived of important opportunities and rights whenever fusion is banned. But it is no mystery why the major parties might join forces to enact such a ban despite their resulting deprivation. Whenever such a ban is enacted, it seems a safe assumption that major parties, contemplating the effects of the availability of a fusion right, calculate their lost ability to expand their electoral base — by making common cause with a minor party from time to time — as outweighed by the expected benefit of preventing all minor parties from fielding fusion candidates — and thus enhancing their longrun ability to become genuine threats. Rigging the rules of the political game in advance can thus serve the interests of the major parties even while it sacrifices their rights.

parties, but typically for the Democrats and Republicans. See *Williams v. Rhodes*. This is precisely the sort of facially neutral but factually skewed regulation struck down in *Anderson*.

Finally, and obviously, an absolute ban on fusion is also, by necessity, a ban on disaggregated ballots. In a fusion system, the right to such a separate vote count — otherwise recognized in Minnesota for all qualified parties in all partisan elections — is completely abrogated.

### III. THE INTERESTS ASSERTED BY THE STATE DO NOT EVEN REMOTELY JUSTIFY THE FUSION BAN.

The State argues that its absolute prohibition of ballot fusion is justified by its interest in reducing voter confusion, enhancing political competition and diversity, eliminating distorted election results, and avoiding factionalism. Each of these contentions is unpersuasive.

#### A. Fusion Does Not Increase, And The Fusion Ban Does Not Reduce, Voter Confusion.

The State's claim that the fusion ban reduces voter confusion by keeping the ballot short and simple, while "[f]usion invites the development of longer and more complex ballots" (State Br. 42), need not detain the Court long.<sup>31</sup> Although the State cites the ambiguous observation of a Minnesota political scientist in the late 1950s that it was "somewhat confusing" that, over the course of a 30 year career, Fiorello La Guardia appeared at one time or another

<sup>31</sup> The State's added contention that fusion might cause "confusion" by permitting minor parties to maintain ballot status (*id.*) is treated in subsection III.C., *infra*, in reply to the State's concerns about electoral "manipulation."

on the ballot line of 9 different parties (*id.* at 43), its theory is entirely speculative and unsupported by the undisputed historical record. This hypothesized confusion has never resulted, and there is no reason to believe it ever will.<sup>32</sup>

<sup>32</sup> Indeed, the evidence in this case is directly to the contrary. Professor Burnham's unrebutted declaration reviews the history of fusion's widespread practice in the 19th century — by an electorate much less educated than it is today — and in states where fusion is currently permitted, and concludes unequivocally that "there is no evidence in the literature on 'fusion' politics that multiple party nominations have caused confusion among voters." Burnham Decl. J.A. 17. See also Amicus Brief of Twelve Professors; Brief of the Conservative Party of New York and Liberal Party of New York, as Amici Curiae in Support of Respondent ("Amicus Brief of New York Parties").

The State claims exemption from any burden to substantiate its "confusion" concern based on this Court's decisions in *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1968), and *Burson v. Freeman*, 504 U.S. 191, 206, 208-09 (1992). These cases, however, create no such gaping exception — with respect to confusion or with respect to any other supposed election-related evil — to the general rule that, even in cases involving no more than intermediate first amendment scrutiny, the State bears the burden of showing that the interests it asserts are real rather than hypothetical. See *United States v. National Treasury Employees Union*, 115 S.Ct. 1003, 1015-16 (1995) ("limited evidence" insufficient); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) ("speculation or conjecture" not enough); *Colorado Republican Campaign Committee, supra*, 116 S.Ct. at 2317 (Breyer, J., announcing judgment, joined by O'Connor and Souter, JJ.); *id.* at 2331, (Thomas, J., joined by Rehnquist, C.J., and Scalia, J.) (concurring in judgment and dissenting in part).

To be sure, the State's evidence may draw upon the logic of the situation — bolstered, where necessary, by the corroborative experiences of other jurisdictions. Cf. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-51 (1986). Thus, Minnesota need not *itself* experiment with fusion, and risk suffering the very harms it says it seeks to avoid, in order to meet its first amendment burden. But in *Burson*, every one of the fifty states had long since abandoned unrestricted access to polling places — after actual experience, in some of those states, of voter intimidation. Moreover, the plaintiff in *Burson* did not question the need for a restricted zone, but

In any event, if confusion first arises from imperfect information, the fusion ban does nothing to relieve it. For it restricts the flow of truthful information to voters by forbidding the full use of ballot labels to give voters indisputably relevant facts about which parties support which candidates — facts that fusion permits voters to acquire. The State's claim that such labels would mislead voters echoes the argument made by Connecticut in *Tashjian* — that voters would not understand what a candidate stood for if the Republican Party were permitted to open its primaries to independent voters. This Court rejected that argument, observing that:

To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise. Appellant's argument depends upon the belief that voters can be "misled" by party labels. But "[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues."

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argued only that a zone with a radius smaller than Tennessee's 100-foot restricted zone would serve that State's purpose. In this circumstance, this Court merely held that Tennessee could meet its burden on the basis of "common sense" without empirical proof that the 100-foot zone, rather than a zone of some smaller radius, was needed.

Equally, *Munro* merely holds that, if demanding proof of a given sort would force "a State's political system [to] sustain some level of damage before the legislature could take corrective action," such proof is not demanded where the legislative "response is reasonable and does not significantly impinge on constitutionally protected rights." 479 U.S. at 195-96. But it certainly does not follow that the State can meet its burden here by simply asserting that permitting fusion would injure Minnesota or its voters, in the face of contrary experience where fusion has been permitted.

479 U.S. at 220 (citations omitted). Indeed, this Court has repeatedly warned against justifying state regulations restricting core first amendment freedoms on the ground that they would "confuse" individuals with too much information:

A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism. As we observed in another First Amendment context, it is true "that the best means to that end is to open the channels of communication rather than to close them."

*Id.* at 221, quoting *Anderson*, 460 U.S. at 798; cf. 44 *Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495, 1511-12 (1996); *Linmark v. Town of Willingboro*, 431 U.S. 85, 94-97 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

Having the State keep voters in the dark about who supports whom is hardly what most people have in mind when they extol the virtues of the "secret" ballot.

Certainly, the State's ostensible fear that fusion would generate "laundry lists" of candidates is baseless, not just empirically but analytically. As the State argues elsewhere, fusion *per se* would not add candidates in any given race. State Br. 19-20. And, to the extent that fusion would encourage the creation and development of new political parties, the State may not legitimately deem this a "problem," provided parties lacking a serious level of support are weeded out through constitutionally acceptable petition, or past performance, requirements. See *Munro*, *supra*.<sup>33</sup>

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<sup>33</sup> The State's reliance on *Lubin* (State Br. 43) is misplaced. While *Lubin* indeed recognizes that states have an interest in avoiding "laundry

The speculation that individual candidates might use fusion to secure multiple ballot listings purely to gain "undue" attention or to associate their names with popular slogans on the ballot (State Br. 42), while "theoretically imaginable," *Williams v. Rhodes*, 393 U.S. at 33, is both extremely unlikely and at best problematic as a basis for state regulation. It is unlikely because such manipulation by a candidate would require a considerable diversion of resources and energy (funds, volunteers, and the like) from the candidate's campaign within his or her "home" party to satisfy ballot access requirements for the sham party. Such manipulation can be made even more unlikely by the less restrictive measure of adjusting the State's ballot access requirements to ensure against it. And any remaining danger is far too remote to justify the *immediate and certain* effect of the ban on the rights of parties, like the New Party, whose *bona fides* as parties are not disputed. *Id.* at 33; see also *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. at 95-98.

Finally, the prospect that single-issue interest groups might use fusion to influence major-party platforms — whether plausible or not, and whether regrettable or not — cannot possibly justify a fusion ban. Indeed, the underlying interest — essentially an interest in regulating the content of a party's platform — is itself illegitimate. The court of appeals' decision affirmed by this Court in *Tashjian* addressed

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list" ballots, the "laundry lists" referred to are lists of candidates without either a serious interest in running for office or a serious chance of success. All *Lubin* holds is that states may not advance this interest by insisting on a filing fee that a serious candidate cannot afford without offering a reasonable alternative for proving seriousness (*e.g.*, a showing of signature support). 415 U.S. at 715. Here, there is no issue either about the seriousness of the candidate the New Party wants to nominate, or about the Party's satisfaction of the objective ballot access requirements imposed by Minnesota law.

the point directly:

In effect Connecticut professes to have a compelling interest in deciding the ideological slant and bases of support for a political party. Most decidedly, however, it is the prerogative of the political party — and not the state — to determine whether it should be structured as a broad-based, relatively non-ideological organization or as a closely knit, strongly ideological unit. The mere incantation of a talismanic phrase such as "voter confusion" cannot transform a specious interest into a compelling one.

*Republican Party of Connecticut v. Tashjian*, 770 F.2d 265, 284 (2d Cir. 1985), *aff'd*, 479 U.S. 208 (1986).

**B. Far From Reducing Competition, Fusion Contributes to Political Diversity, Which The State Cannot, In Any Event, Simply Mandate.**

Having identified political diversity as one of the core values served by the First Amendment, the State mistakenly equates *political* diversity and electoral competition with *candidate* competition. For the State, the "marketplace of ideas" literally is the "marketplace of candidates." And because, in its view, fusion does not contribute to the marketplace of candidates, it cannot contribute to the marketplace of ideas. Fusion is therefore unprotected activity and, reciprocally, an absolute ban on fusion — allegedly promoting political diversity, again by promoting candidate competition — is justified. (State Br. 44-45)

This argument is, by turns, illogical and offensive to bedrock constitutional values.

First, the "marketplace of ideas" means many things other than the range of available candidates, and political

organizations can contribute much to that marketplace without contributing new candidates.<sup>34</sup> They can identify previously neglected issues, develop program suggestions around those issues, mobilize blocs of voters in support of those suggestions, maintain those blocs over time through their organization, and in myriad other non-candidate-based ways help diversify public debate and political action. Minor parties do just these things all the time. If fusion helps minor parties — and the State does not seriously contest the fact that it does — then fusion contributes to the marketplace of ideas. Indeed, the State itself cites Professor Burnham's declaration asserting that fusion *promotes* political diversity. State Br. 5.

Second, and again uncontested by the State, the actual practice of fusion has of course *increased* the number of candidates. By improving the general acceptability, endurance, and strength of minor parties, it improves their ability to mount their own candidacies. While the literal act of fusion does not itself add to the candidate pool, the incorporation of fusion in a strategy of minor-party building has the effect, through success in that building process, of increasing the pool indirectly. Few if any of the minor parties in New York

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<sup>34</sup> In the same vein, the State argues (State Br. at 20) that a fusion nomination on the ballot provides voters with useless information — that knowing that major and minor parties agree on someone or something is unimportant. This is at best a bizarre claim and indeed borders on the absurd. In any survey of the political landscape and the political identities and strategies it contains, identifying points on which leaders of parties *agree* is every bit as useful information for voters as isolating points on which they *disagree*. The level of "bipartisanship" evident in United States foreign policy, for example, or on approaches to the deficit, is every bit as relevant to voters as is the level of disagreement among the major parties. It tells voters what the real boundaries of political debate are. See *Swamp*, 950 F.2d at 389 (Ripple J., joined by Posner and Easterbrook, JJ., dissenting from denial of rehearing *en banc*). There is no reason why this should be any different for minor/major party agreement on candidates, despite residual disagreement on programs.

believe they would survive for long without fusion.<sup>35</sup> All the non-fusion candidates that such survival permits, then, should be "credited" to a candidate diversification that otherwise would not take place. Indeed, historically, and again uncontested by the State, minor party activity in the latter part of the 19th century — with all the non-fusion candidates it produced — would not have been possible without fusion. See Argersinger at 288.

Third, the challenged ban does not in any event *itself* promote candidate diversity, since one likely option left to a party under the ban is to nominate *no one* at all. If the State has a legitimate interest in candidate diversity, the fit between this interest and the challenged regulation is close to non-existent.

Fourth, invoking a state interest in candidate diversity to justify a restriction on freedom of nomination is incompatible with the First Amendment, which clearly forbids state efforts to orchestrate the electorate's menu of choices by suppressing the *actual* choices made by the State's citizens through their political parties. See *Republican Party v. Tashjian*, *supra*, 770 F.2d at 284. Surely no wish to channel voters into ostensibly "overlooked" directions can justify forcing a minor party to nominate a second-choice candidate when its members believe that another candidate would better advance their goals. Yet the fusion ban does just this.<sup>36</sup> The

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<sup>35</sup> See Amicus Brief of New York Parties.

<sup>36</sup> It is as if the State, deeming a new party's nominee too similar ideologically to someone already nominated, or too familiar to voters from prior elections in which the party's nominee had run or from prior offices the nominee had held, were to invoke an interest in diversity of candidates to insist that the new party either nominate no one at all or select a second-choice candidate the major parties have "overlooked" so as to offer the voters "a choice, not an echo."

State erroneously equates the *ends* served by the First Amendment with the *means* tolerated by it. Political and ideological diversity are conditions we can hope will be achieved through vigorous, uninhibited debate and political rivalry. *New York Times v. Sullivan*, 376 U.S. 254 (1964). But that hope provides no justification for state orchestration of, or interference with, a party's right to nominate — the exercise of which, perhaps more than the exercise of any other right, defines what a political party *is*.

### C. Fusion Does Not Produce, And The Fusion Ban Does Not Relieve, Electoral Distortions.

The State argues that two potential "distortions" of the

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Imagine what one would think if the State were to say that, in the interest of presenting voters with a wider menu of choices and in the interest of reducing their confusion, candidates on the ballot for electoral office may be designated "LEFT," "LIBERAL," "MODERATE," "CONSERVATIVE," "RIGHT," or "NON-IDEOLOGICAL," but that, once a candidate for a given office has been designated with one of these labels, no other party's nominee may be listed with the same designation. Under such a system, once a nominee (whether Mr. Dawkins or someone else) had been listed, say, as LIBERAL by the DFL, the New Party and Mr. Dawkins would either have to designate him as LEFT, or select an alternative candidate for whom that designation would seem acceptable. To the claim of the New Party that this is an unacceptable choice and that it has a right to have this candidacy labeled in accord with the political views of the candidate, the party, and the party members who selected him as their standard-bearer, the State would respond, "Sorry, the LIBERAL label is already spoken for. We're not denying you the right to vote for a liberal, or to list another nominee, but our citizens are entitled to diversity, not just one liberal after another, and are entitled to avoid the confusion that duplicative and overlapping ballots entail." Surely any such assertion by the State would be seen at once for what it is: a naked, and nakedly unconstitutional, attempt to manipulate information in the supposed interest of the people. What Minnesota is doing here is no better, and perhaps worse. Even if it were not born of a motive to reduce rather than enhance voter choice (*but see supra* at 7-8 & nn. 7&8), it could not be sustained.

ballot make the fusion ban necessary: "raiding" of a small major party's primary *by an "established major party"* (State Br. 45) to gain short-term political advantage; and the nomination *by a minor party* of a popular major party candidate simply to obtain major party ballot status. *Id.*

As regards the first "distortion," the Minnesota ban is not even rationally related to an interest in preventing this eventuality. The reason is that, although the Minnesota election code bars fusion both by major parties — defined in Minnesota to include all parties that have won 5 percent of a statewide vote — and by parties (like the New Party) which have not yet qualified as "major," it does so through different provisions altogether. Major party fusion is barred by § 204B.04 subd. 1, a statute that was not challenged and could not have been challenged by the minor-party plaintiff in this case because it applies *only* to "major" parties. *See* Pet. App. 10. "Minor" party fusion is barred by Minn. Stat. §§ 204B.06 subd. 1(b) and 204B.04 subd. 2. These statutes *were* challenged in this case, and were struck down by the court of appeals as unconstitutional.

While the State might theoretically attempt to defend its *major* party fusion ban on the ground that it would prevent the victimization of a small "major" party by a larger one in the party primaries, it cannot claim that the *minor* party fusion ban advances this interest because minor parties, being ineligible under state law to participate in the State's open primaries (Minn Stat. §§ 204B.03 and 204B.07), are not even *theoretically* vulnerable to the primary party-raiding the State purports to fear.<sup>37</sup>

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<sup>37</sup> Minor party nominations in Minnesota are also unregulated, and therefore minor parties are free, by their party rules, to exclude non-members from voting in whatever nomination procedure they devise, again avoiding altogether any "raiding" problem.

The second "distortion" identified by the State is that a minor party might bootstrap its way to "major party" status by nominating a popular major-party candidate. State Br. 42, 45-46. First, this concern arises only where the different fusing parties are permitted separate ballot lines. It cannot begin to justify Minnesota's absolute fusion ban, which prohibits fusion even without such ballot disaggregation, and in which the "bootstrap" problem therefore does not exist even in theory. See II.C., *supra*.

But in fact, even in a disaggregated ballot system, this "problem" is not a legitimate problem at all. There is nothing illegitimate about "crediting" votes cast on the separate ballot lines of fusing parties toward the satisfaction of their respective ballot-access requirements. The State's argument that fusion in essence amounts to theft by the minor party "of the strength of a candidate of another party" (State Br. 31) is fundamentally wrong-headed because it ignores altogether the uncontroverted effects of the "wasted vote syndrome." See pp. 8-10, *supra*. Where minor party supporters choose as their standard bearer someone also nominated by another party and

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Even if the fusion ban at issue *did* apply to small "major" parties, the State's interest in preventing party-raiding would still not justify it for several reasons. First, Minnesota's open primary laws — in which any voter may participate regardless of party affiliation or loyalty — suggest that preventing raiding has not been a major concern of the State Legislature. Second, there are less restrictive ways to deal with any such problem. New York, for example, protects minority parties against take-over by outsiders by requiring consent of the minor party's governing body to the candidacy of any non-member. NEW YORK CONSOLIDATED LAWS, ELECTION LAWS, Article 6, §6-120(2,3)(party consent requirement). And, given *Democratic Party v. Wisconsin*, *supra* (state cannot mandate open primaries for Presidential delegate selection when party rules require closed primary), and *Tashjian* (state may not mandate closed primaries when a party wants to open its primary to independents), it appears that even a small "major" party could protect its primary process by resolving to exclude non-members from participation.

are intent on voting for that candidate, the fusion ban *forces* them to do so on the line of a party other their own. Their *forced* major party votes are the *real* stolen goods, which the relegalization of fusion simply permits the minor party to recover.

Clearly then, fusion creates not distortion, but greater clarity. The picture of electoral support that it permits, especially under a disaggregated ballot system, is on all accounts a truer and more accurate one than that provided under a fusion ban.

#### **D. Fusion Does Not Splinter Parties, And The Fusion Ban Is Not Necessary To Prevent Such Splintering.**

The State finally asserts (State Br. 46-49) that its fusion ban is justified by its interest in avoiding the "splintered parties and unrestrained factionalism" that this Court warned against in *Storer v. Brown*, 415 U.S. 724 (1974). But the ban is not even rationally related to any such interest; the interest itself could be served by a less restrictive alternative to Minnesota's absolute ban on fusion; and *Storer* provides no support for the argument the State purports to base upon it.

As to rational relation, there simply is none. This is a case asserting a right to fusion, not fission; to party alliance, not splintering; to consensual coalition, not bitter feuding. Nothing in Minnesota's fusion ban advances any interest in protecting party integrity, and no threat to that integrity follows from striking down the ban. How could it, when what the ban prohibits — and what striking it down would permit — is the free choice by parties of the electoral strategy that they judge most effective in advancing the interests of their members and supporters? What could be more deeply "splintering" of parties than denying them the ability to make that choice? What could more directly threaten the role of

parties as organizers of political competition and debate — and thus more clearly raise the spectre of "unrestrained factionalism" — than a statute forbidding them from acting on decisions about how they wish to perform that essential function?

As to less restrictive alternatives, the State *admits* that Minnesota's fusion ban is "somewhat broader than necessary to accomplish its asserted interests." State Br. 50. Given the fundamental character of the rights at issue, that admission alone should be fatal to any defense of the statute on the basis of its protection of party integrity, since a significantly less restrictive alternative means of advancing that interest is available: minor parties can simply be forbidden to nominate, as fusion candidates, candidates who have not consented to that nomination or whose "home" party objects to it.<sup>38</sup>

Finally, the State's reliance on *Storer* is utterly misplaced and unhelpful to the State's argument.

First, the facts and issues involved in *Storer* are fundamentally different from the facts and issues of this case. The plaintiff in *Storer* was a would-be independent candidate — not a political party — who claimed that the disaffiliation rule violated *his* personal right to *run* as an independent. The plaintiff in this case is a *political party* — not a candidate at

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<sup>38</sup> Alternatively, and in New Party's view more wisely and constitutionally, a state could do what New York State has done, which is to require only the consent of the fusion candidate and the "non-home" (usually minor) party. This minimally restrictive alternative has been successful in New York in protecting against the only real dangers of an unregulated fusion system — nominations not welcomed by candidates, and major party raiding of minor parties — and has not led to party splintering. NEW YORK CONSOLIDATED LAWS, ELECTION LAWS, Article 6, §6-120(2,3). See also Amicus Brief of New York Parties.

all, independent or not — asserting its right to *nominate* the candidate of its choice. In *Storer*, the provision of California's election law that barred political parties from nominating certain candidates was not at issue — and could not have been, given the lack of standing of the candidate plaintiff to challenge that provision. See 415 U.S. at 726-27. Here, that is precisely the aspect of Minnesota's election law that is being challenged. *Storer* sustained a rule "designed to protect the parties and the party system against the disorganizing effects of independent candidacies." *Tashjian*, 479 U.S. at 224. What is challenged here is an election rule most charitably understood to protect parties against themselves, and then in ways that frustrate their ability to advance the clearly expressed interests of their members. *Storer* was fundamentally about the disrupting effects of "sore losers" and "Johnnies-come-lately" on the parties' own process of selecting candidates. This case is fundamentally about the State's power to disrupt that process itself.

Second, these differences are relevant — and in ways unhelpful to the State in assessing the relative burden on rights imposed by the *Storer* disaffiliation rule and the Minnesota fusion ban. The State argues that the restrictions on minor party rights upheld in *Storer* exceed those imposed by the Minnesota law challenged here. It observes, for example, that the disaffiliation rule upheld in *Storer* excluded more potential candidates from minor party consideration than does Minnesota's fusion ban. State Br. 35. And because those restrictions were upheld, the State reasons, Minnesota's law should be upheld as well.

Whether the State is right or wrong about *quantity* of candidates excluded under the respective statutes, it is certainly wrong in its conclusion. For it confuses the *quality* of the rights at stake in the respective challenges to those statutes. As this Court has repeatedly made plain, the rights of parties and their members — as against the rights of sore loser

candidates or of disgruntled individual voters — are *fundamental* in our constitutional scheme. And their *right to nominate the candidate of their choice* is perhaps the most fundamental party right of all — fundamental in the most direct textual sense in a way that the right of an individual to run as an independent candidate simply is not.<sup>39</sup> The right to nominate its candidate of choice is *constitutive* of what a political party *is* and of what it *means* for individuals to "assemble" in such a party — and through that assembly to exercise their individual and collective first amendment freedoms of "speech" and of "petition" through the electoral process. Thus, even the rights of individual voters — from whose rights the rights of parties derive — have been deemed overborne when they come into conflict with legitimate associational rights of parties.<sup>40</sup> The fact that it is the rights of parties that is at issue in this case and not the candidate "right" that was at issue in *Storer* is not a small distinction. It

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<sup>39</sup> *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (citing *Bullock v. Carter*, 405 U.S. 134, 143 (1972)) (right to run for office not fundamental).

<sup>40</sup> *Tashjian* illustrates this principle in a footnote (479 U.S. at 215 n.6) distinguishing this Court's decision in *Tashjian* from an earlier decision in *Nader v. Schaffer*, 417 F.Supp. 837 (D.Conn.), *summarily aff'd*, 429 U.S. 989 (1976), in which it had *upheld* the same closed primary statute that it struck down as unconstitutional in *Tashjian*. The Court explained that it had upheld the statute when challenged merely by the unaffiliated voter in *Nader* because, at that time, unaffiliated voter participation was not welcomed by the political parties. It struck down the rule in *Tashjian* as applied to the Republican Party only after that party decided that it *wanted* such voters to participate in its primaries. See also *Rosario v. Rockefeller*, 410 U.S. 752 (1973), distinguished on the same basis in *Tashjian*, 479 U.S. at 215 n.6. Thus, in all these cases, it was the *party's* interest that made the difference. See also *Republican Party of Connecticut v. Tashjian*, 770 F.2d at 280; *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992); *Duke v. Cleland*, 1996 U.S. App. LEXIS 16632 (11th Cir. 1996); J. Guttman, "Primary Elections and the Collective Right of Freedom of Association," 94 *Yale Law Journal* 117, 120 (1984).

renders incoherent the comparison of burdens urged by the State, because the burdens are on rights held by this Court to have fundamentally different character and values.

Third, this Court has never read *Storer* in a way that would even suggest an analogy between the disaffiliation rule upheld there and the fusion ban challenged here. *Storer* itself, of course, had nothing to say about the effect of a disaffiliation rule on the right of a *party* to *nominate*. But this Court has visited the issue elsewhere, with *dicta* distinctly unhelpful to the State. In *Tashjian*, this Court analogized the closed primary law *overturned* in that case to an "affiliation rule" providing "that *only Party members* might be selected as the Party's chosen nominees." 479 U.S. at 215 (emphasis added). Such a law, the Court said, "would clearly infringe upon the rights of the Party's members under the First Amendment." *Id.* If this is so, then the First Amendment must similarly bar a rule providing that no *other* party's members *or nominees* might be selected as the Party's chosen nominees. That, in essence, is this case.

# CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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